

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2018] NZIACDT 21

Reference No: IACDT 010/18

IN THE MATTER of a referral under s 48 of
the Immigration Advisers
Licensing Act 2007

BY **The Registrar of
Immigration Advisers**

Registrar

BETWEEN **T U**
Complainant

AND **S I**
Adviser

SUBJECT TO CONFIDENTIALITY ORDER

DECISION

REPRESENTATION:

Registrar: Mr A Dumbleton, lawyer, Legal Group, MBIE, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 18 June 2018

Introduction

Mr I's circumstances

- [1] Mr I was a licensed immigration adviser. He had a stroke and his health deteriorated further after that happened, and he was likely unwell earlier. This is one of several complaints from the time Mr I was unwell and still practising.
- [2] Professional disciplinary regimes are usually separated from health-related competency issues. However, the Registrar does not have power to step in and administer the practice of a licensed immigration adviser. Practitioners are not required to give a power of attorney to another licensed immigration adviser either; which is the way some other professions manage cases like this one.
- [3] I will take Mr I's situation into account when deciding the complaint. He is not able to understand the complaint due to his health; family members have been cooperative, but they are not licenced immigration advisers. I am dealing with the complaint without any response from Mr I, but this is not due to any fault on his part.
- [4] The Registrar, as the Tribunal's rules require, issued a notice of complaint. It sets out the grounds for complaint she thinks have been established. She provided the written documents supporting the complaint, and says the documents prove the relevant facts. I will look at the Registrar's grounds of complaint, and the evidence provided to support them; but, will not draw any inference from Mr I's inevitable silence.

The Registrar's grounds of complaint

- [5] The Registrar's account of the complaint is the only view presented. Accordingly, I will set out details of the grounds, as she put them in her statement of complaint. The statement of complaint has references to the supporting documents, and copies of them attached. The details are:

Breach of clause 18(a) of the Code of Conduct 2014 in relation to written agreements

Clause 18: A licensed immigration adviser must ensure that (a) when they and the client decide to proceed, they provide the client with a written agreement.

In November 2016 the Complainant engaged the Adviser for assistance in submitting an Expression of Interest to INZ and an application for residence under the Skilled Migrant Category.

The Complainant paid the Adviser a total of \$4,000 for his services in instalments in November 2016.

It appears the Adviser did not meet his obligations under clause 18(a) of the Code of Conduct 2014, by failing to ensure that a written agreement was provided to the Complainant, once he decided to proceed.

Breach of clause 1 of the Code of Conduct 2014 in relation to the advice provided to the Complainant regarding his application for residence under the Skilled Migrant Category

Clause 1: A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves in a timely manner.

The Complainant sent the Adviser a copy of his job description via email in November 2016.

The Adviser claimed 50 points for skilled employment as an Inland Revenue Department (IRD) Collections Officer, which he claimed was a substantial match for the ANZSCO 599212 position of Court Collections Officer.

The ANZSCO description sets out that a Court Collections Officer "Implements court orders and serves legal orders and summonses as an officer of the court".

The ANZSCO core tasks for a Court Collections Officer are set out as follows:

- listing actions for hearing and processing documentation for court actions
- documenting details of court proceedings, actions and decisions
- enforcing the law as an officer of the court by executing court orders such as eviction notices
- serving legal orders and documents such as summonses and subpoenas
- organising jury and witness lists, and summoning and swearing in juries and witnesses
- assisting Solicitors in areas of conveyancing, contracts, common law, probate and other legal practice matters
- satisfying statutory requirements, establishing beneficial entitlements and distributing assets.

During the course of processing the application, INZ sent a questionnaire to the Complainant's employer asking questions about what tasks the Complainant undertakes as part of his role. The Complainant's employer answered in the negative for each of the ANZSCO core tasks for Court Collections Officer.

On 20 March 2017, the Complainant emailed the Adviser advising that his employer had received INZ's questionnaire. The Complainant stated that his employer "had to say no" to a number of questions because the tasks listed were not part of the Complainant's job description.

The Complainant asked the Adviser whether it was necessary that everything listed under the selected ANZSCO description should match the tasks he undertook as part of his role. The Adviser responded by email advising "Your job description should be about 80 percent. J/29

In the PPI letter dated 27 March 2017, INZ set out its concerns that it appeared that the Complainant's employment did not substantially match the ANZSCO description for Court Collections Officer.

INZ informed the Adviser that, based on the information held about the Complainant's role obtained from verification checks with his employer, and an assessment of the Complainant's job description, it appeared that his role did not substantially match the description for the claimed occupation as set out in the ANZSCO. On this basis, the Complainant was eligible for a total of 110 points for his age, qualifications and work experience. Without points for skilled employment, the application would not meet any application selection point as required by Immigration Instructions at SM4.5 for the application to be approved.

INZ concluded the PPJ letter advising that the overarching requirement of ANZSCO 599212 Court Collections Officer was to implement court orders, serve legal orders and summons as an officer of the court.

On 30 March 2017, after reading the PPI letter, the Complainant sent an email to the Adviser in which he stated:

"As I explained to you earlier that my position is not listed under the SMC category but you advised that we could relate it to Court Collections Officer and claim points. I did not know how that worked but as you said you could give them an explanation of why this had been chosen so I decided to apply. please let me know if there is anything we could do from here and would it even be worth it or no, otherwise I guess there is nothing else I can do from my side."

The Adviser responded to the Complainant stating "if you can check how much of your duties are similar to the court collection officer. We can then make a presentation to them. They have not declined your application. We need to prove your employment is skilled although it is not listed".

The Adviser responded to INZ on 9 April 2017 advising that he selected "Court Collection Officer" because it was "the nearest job description available." The Adviser also indicated that if INZ were to "convert the word 'Court' to 'IRD' as both are NZ Government entities, you will notice that the core tasks are similar".

On 11 April 2017, INZ declined the Complainant's application for residence as he did not meet the requirements under the Skilled Migrant Category. INZ stated that employment is only to be assessed according to an ANZSCO description as it is, not as it would appear with a word adaptation. INZ stated under each ANZSCO core task:

The description of the task clearly states a direct correlation with the courts, not Inland Revenue Department, and as you work for Inland Revenue Department, not the courts, we are not satisfied you are performing this task.

INZ further advised:

As your role does not substantially match the ANZSCO description and core tasks for a Court Collections Officer or any other occupation included on Appendix 6 or 7 of the Immigration New Zealand Operations Manual, we have not awarded you the 50 points you claimed for skilled employment.

Without points for skilled employment, the Complainant's application had insufficient points to meet the lowest selection criteria of the Skilled Migrant category during the currency of his EO I.

It appears the Adviser may not have acted with due care and diligence when he failed to correctly assess the Complainant's job description, claiming that it was a substantial match for a Court Collections Officer, when in fact, the Complainant carried out none of the core tasks listed under this ANZSCO description and did not work within the courts system.

Immigration advisers are required to assess each client's immigration situation including establishing eligibility criteria, identifying potential barriers to eligibility and evaluating the possible range of options. It appears the Adviser may have failed to undertake a proper eligibility assessment in accordance with his obligations under clause 1 of the Code of Conduct 2017.

Further breach of clause 1 of the Code of Conduct 2014 or Incapacity in relation to the IPT appeal; and Incapacity in relation to the Adviser's inability to continue providing his services

Clause 1: A licensed immigration adviser must be honest professional, diligent and respectful and conduct themselves in a timely manner.

IPT appeal

On 18 April 2017 the Adviser sent the Complainant an email attaching a copy of INZ's letter declining the application. The Adviser informed the Complainant that he had the option to file an appeal to the Immigration Protection Tribunal. The Complainant sent the Adviser an email in response in which he stated:

We applied under this position as advised by you as you were confident that you can relate this to my position and still it had been declined. I had already paid you your fees in good faith and only took your

assistance for my application because my current position did not fall under the SMC category. I really don't know how an appeal would make a difference to their decision looking at the facts they have stated in their application. Would you be making an appeal out of the fees I have already paid you? Let me know how this would work.

The Complainant advises that when he spoke to the Adviser, the Adviser was of the view that the immigration officer assessing the application had made a "wrong decision." The Complainant states he met with the Adviser to discuss INZ's decision. During the meeting, the Complainant states the Adviser told him not to worry as he had dealt with cases like this in the past and the decision made by INZ was incorrect.

In the letter declining the application, INZ had reiterated that the tasks under the chosen ANZSCO code clearly state a direct correlation with the courts and not IRD, and as the Complainant worked for IRD and not the courts, they could not be satisfied that he was performing the required tasks in line with the ANZSCO description. It appears the Adviser failed to recognise that the Complainant's job was not a substantial match, even after INZ had set out why it was not in the letter of decline.

The Adviser lodged an appeal with the IPT on 26 May 2017.³⁸

On 25 September 2017 the Complainant sent an email to the IPT advising that the Adviser become unwell and asking that the IPT communicate with him directly. A case manager at the IPT responded to the Complainant advising him that they had been trying to contact the Adviser but they had not been able to reach him. The case manager advised the Complainant that the appeal was unsuccessful:

The IPT was satisfied that INZ had properly assessed the Complainant's occupation; INZ was correct to find that the ANZSCO tasks for Court Collections Officer related specifically to the role of a court officer and that the Complainant's position as an IRD collections officer was not a substantial match to the ANZSCO occupation of Court Collections Officer.

It appears the Adviser failed to provide accurate advice to the Complainant regarding the decline of his application and subsequent appeal to the IPT. The Adviser may not have acted with due care and diligence by failing to recognise the Complainant's job was not a substantial match and submitting an appeal based on an incorrect assessment of the Complainant's job description. Alternatively, the Adviser's failure to provide accurate immigration advice may have been related to his medical issues, and therefore may amount to Incapacity rather than a further breach of clause 1 of the Code of Conduct 2014.

Inability to continue providing his services

While the Adviser's health may have been impaired following the stroke in February 2017, it appears that he continued to provide his services until he became seriously unwell in early August 2017.

Following the submission of the appeal to the IPT, the Complainant was unable to contact the Adviser to obtain an update on his case. While the Complainant has been communicating with [a member of Mr I's family] since the Adviser became unwell, he has been unable to obtain advice as to where to get assistance, or a response as to whether a refund is payable.⁴¹

On 25 October 2017 a medical report, dated 15 September 2017, was provided to the Authority. The report of [a medical practitioner] states that the Adviser suffers from severe depression and cerebrovascular disease. The report also notes the Adviser's total lack of competence to manage his affairs in relation to his property, partial capacity to communicate and poor understanding of his situation.

Based on the information available, it appears that the circumstances giving rise to the complaint relate in part to the Adviser's state of health and his resulting inability to manage his practice. It appears the Adviser is no longer in a position to provide his services or meet his obligations as a licensed immigration adviser under the Code of Conduct 2014 on account of being medically incapacitated.

Discussion

Evidence

- [6] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].
- [7] In this case the gravity is at the lower end. The unusual factor is that Mr I cannot respond. The complainant has brought the complaint and provided evidence for it, and the Registrar has investigated. She has presented the relevant information available to her.
- [8] I have examined the material, and I am satisfied what the registrar says about the complaint is supported by the material. In some respects, proof relies on the absence of material showing that Mr I did perform his duties properly. For example, there is no written agreement. I rely on what the complainant has said, and the Registrar's failure to find contradictory material.
- [9] The information I have presents sufficient proof to establish the essential facts in the Registrar's statement of complaint; notwithstanding my caution because Mr I cannot respond.

Mr I's deterioration

- [10] The events subject to the complaint commence in November 2016. Mr I suffered a stroke in February 2017. A medical report the Authority provided says Mr I presented in February with an apparent anterior

circulation transient ischemic attack (TIA). He had speech difficulty and confusion. The report refers to Mr I reporting fluctuations in his condition. The report discusses ongoing language dysfunction, and some uncertainty as to the cause.

- [11] It is not clear when Mr I first experienced TIAs, or other effects on his cognition from a vascular cause.
- [12] Accordingly, throughout the time the events giving rise to the complaint occurred, Mr I's mental faculties may not have been functioning well, and the overall trajectory was further and serious decline. Certainly, by February 2017 his problems were serious, and I must consider it likely they existed earlier than that. The medical report refers to significant underlying causes, which were not new.
- [13] While the medical assessment was obviously thorough, it was not an attempt to measure cognitive ability with reference to his professional service delivery; or to put it on a timeline.

Absence of a written agreement

- [14] A written agreement is an integral part of commencing a professional engagement under the Licensed Immigration Advisers Code of Conduct 2014 (Code of Conduct 2014). The evidence shows Mr I commenced an engagement, received payments, and should have been providing professional services; but there was no written agreement. That is sufficient to establish this ground of complaint.
- [15] However, it is necessary to consider this ground of complaint alongside the ground of incapacity. For the reasons I will discuss, I do not find there is proof Mr I intentionally breached this obligation.

Failure to meet professional standards in providing advice to the complainant

- [16] Mr I apparently failed to provide adequate advice regarding the approach that a job classification as a Court Collections Officer could include an IRD Collections officer. However, there may well be an overlap in skills and tasks between the two roles. None-the-less, at best, the case for the appellant coming within the classification was speculative. The complainant was entitled to have a clear explanation of the difficulties he faced; and instead, the evidence shows he received misplaced assurances.
- [17] Accordingly, this ground of complaint is made out, but in the context of Mr I's incapacity, not as a stand-alone ground involving lack of care or intentional disregard for his professional obligations. As from November 2016 it is likely that Mr I was incapacitated to a significant degree. The

errors he made provide some positive evidence that he was likely afflicted by November 2016. He had been a licensed immigration adviser before the series of complaints. The number of complaints and the nature of them points to incapacity causing the failure to perform his professional duties; and tells against Mr I being a practitioner with poor professional standards that were long-standing. The information supporting the complaint does not allow a more precise evaluation, but I am satisfied that medical incapacity was probably the cause of the grounds of complaint in this case.

The Immigration and Protection Tribunal appeal

[18] The decision of the Immigration and Protection Tribunal indicates the reasons advanced for the appeal were slight. I would be reluctant to find the appeal was so unmeritorious, on the information I have, to conclude Mr I could not have lodged it. However, it is clear he did not provide a coherent argument that had a reasonable prospect of success to support the appeal, and then he failed to prosecute the appeal.

[19] However, Mr I was badly affected by his stroke and other medical factors by the time he lodged the appeal. Accordingly, I find the ground of complaint is made out, but only in the context of incapacity not due to lack of care or disregard for his professional obligations.

Incapacity

[20] Incapacity is a ground for complaint under s 44(2)(c) of the Immigration Advisers Licensing Act 2007 (the Act). The word may refer to a range of situations, including blameworthy conduct where a licensed immigration adviser does not have the capacity to perform work they agree to perform; when they ought to have known that was the case. If those were the limits of this ground of complaint the evidence would not establish it was made out.

[21] In my view, the evidence does establish Mr I was probably practising when he was incapable. If that was not the case, he must have been deliberately breaching his professional duties. The evidence does not support that. In my view, given the medical history, Mr I may not have understood he lacked capacity, potentially thinking his situation was temporary and he would recover quickly. I place it as being equally likely that:

[21.1] Mr I failed to understand he was incapable; and

[21.2] he knew or should have known he lacked capacity to deliver the professional services promised to the complainant, but persisted regardless.

[22] As neither of the possibilities regarding Mr I's awareness of his situation is more likely on the evidence, he is entitled to the finding he suffered incapacity, without insight or moral blameworthiness.

[23] I must decide whether incapacity without blameworthiness is a ground for complaint. When doing so I am mindful of the decision of the Health Practitioners Disciplinary Tribunal (HPDT) in *Re Tolland* [2010] NZHPDT 325 (9 September 2010). The HPDT observed at [39]:

Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amount to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances ... This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers.

[24] The professional setting is varied, but duties of competence, application of skill, honesty, disclosure and propriety are shared by a wide range of professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms it is intended to protect the interests of consumers receiving immigration advice, which corresponds to the duties other professionals have to the public engaging their services.

[25] In a professional disciplinary setting, it is generally necessary to determine whether any lapse is sufficiently serious as to warrant the complaint being upheld as a professional disciplinary matter. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.

[26] However, the statutory context is important. There have been numerous decisions of this Tribunal that evaluate whether a complaint serious enough to uphold as a professional disciplinary matter. Nothing in this decision is intended to alter what is said in those decisions. The issue I now need to decide is whether "incapacity" as a ground of complaint in s 44(2) includes "innocent" incapacity. Effectively the question is

whether the Tribunal has jurisdiction where a matter is one of simple competence or capacity.

- [27] To deal with the question the starting point is s 3 of the Act, which states the purpose of the Act is “to promote and protect the interests of consumers receiving immigration advice”. I must assume, when passing the Act, Parliament recognised incapacity, and a lack understanding of the incapacity will occur for some licensed immigration advisers. When it does occur, the Registrar may refuse to renew a licence as the person will not meet the requirements for renewal. However, she cannot cancel a licence on that ground. Section 27 allows cancellation when a person is simply not entitled to hold a licence; it gives no power to the Registrar to make an evaluation of incapacity.
- [28] The power to suspend or cancel a licence based on an evaluation of merit lies solely with this Tribunal. This is not the same as the structure for other professional licensing and disciplinary regimes; some of them have sophisticated competence assessment regimes that may be engaged at any point in time. Against this background, it would be unsurprising if simple “incapacity” could be brought before the Tribunal. It may be significant that “incompetence” and “incapacity” are included in s 44(2) separately from the Code of Conduct 2014.
- [29] The Code of Conduct 2014 contains a set of professional practice standards, which includes a requirement to work within a licensed immigration adviser’s limits of knowledge and skills (cl 8). To fail to do so knowingly, or through lack of care, is blameworthy. Generally, the concept of a disciplinary threshold fits well with those requirements, and incompetence or incapacity in the context of working outside limits of knowledge and skill will fall within that part of the Code of Conduct.
- [30] However, when the Act deals with “incompetence” and “incapacity” in s 44(2) separately from the Code of Conduct, it would not be surprising if it covers more than a practitioner working outside of their limits of knowledge and skills. I am satisfied that is the correct approach to the Act. In summary, my reasons are:
- [30.1] The wording of s 44(2)(c) is consistent with that view, indeed to conclude otherwise I would have to read down the provision; “incapacity” is a word that covers Mr I’s situation.
- [30.2] Cases of simple incompetence and incapacity, where a practitioner lacks awareness are uncommon, but inevitable. Parliament must have been concerned to deal with them in the Act. The Act generally regulates the profession, and it is

necessary to deal these cases to achieve the objectives set out in s 3 of the Act.

[30.3] The Tribunal is the only body given the powers to suspend licenses, cancel licences, or order the refund of fees and compensation. Those powers are potentially required to deal with the consequences of incapacity where a practitioner lacks awareness.

[30.4] The Act has some indications that the Tribunal is not solely concerned with “disciplinary” matters. Section 41(a) says the Tribunal makes decisions about “matters”, and it is named the “Immigration Advisers Complaints and Disciplinary Tribunal”. That is consistent with the Tribunal dealing with complaints that include competence issues, rather than only truly disciplinary issues.

[30.5] It is possible to exercise the professional disciplinary powers to address simple incapacity fairly in relation to a licensed immigration adviser. In such cases, identifying the lack of blameworthiness, recognising that punitive elements of sanctions have no place, and using confidentiality orders are among the powers available for that purpose.

[31] Accordingly, I am satisfied that on the evidence before me Mr I lacked the capacity to deliver professional services to the complainant due to his health, and that is a ground for complaint. I uphold that ground of complaint.

Decision – upholding a ground of the complaint

[32] The Tribunal upholds the complaint in the respects identified:

[32.1] Mr I failed to have a written agreement, and failed to maintain standards of professional delivery, which breached the Code of Conduct 2014, however

[32.2] that finding is upheld as ancillary to the finding Mr I suffered incapacity, and there is no blameworthiness in his conduct.

Sanctions

- [33] For the reasons discussed, subject to hearing from the parties, it appears Mr I's career has ended and there will be no question of him being licensed again. His licence has been suspended, but may need to be cancelled to complete the process. It is likely not appropriate to impose a penalty.
- [34] It does appear appropriate to make orders for the refund of fees, and any compensation that may be justified. The complainant should identify what his claims are for the refund of fees (apparently the whole of the fees paid), the amount of any compensation and the grounds for requiring Mr I to pay compensation.

Timetable

- [35] The Registrar and the complainant may file submissions regarding sanctions within 10 working days of the issue of this decision.
- [36] Mr I's representatives may file a reply within a further 10 working days.
- [37] Any party may apply to vary the timetable.

Publication of the adviser's name

- [38] The Registrar is requested to indicate whether in her view Mr I's identity should be published. The Complainant and Mr I's representatives may of course also take a position on this matter.
- [39] The name or information that may identify Mr I, the complainant, and all persons referred to in this decision, other than the Registrar, are not to be published until the Tribunal gives its final decision on confidentiality.

DATED at WELLINGTON this 18th day of June 2018.

G D Pearson
Chair